

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

STEVEN LEE FIELD,

Plaintiff,

v.

DANIEL O. COULSON; JAMES E.
SANDVIK; KRISTOPHER PAUL
BARTER; BEAVERTON POLICE
DEPARTMENT; PORTLAND POLICE
BUREAU; TRI-MET TRANSIT
AUTHORITY; CITY OF BEAVERTON;
CITY OF PORTLAND,

Defendants.

No. 04-1524-HU

FINDINGS AND RECOMMENDATION

Bryan W. Dawson
Dawson & Dawson
5695 Hood Street
West Linn, Oregon 97068
Attorney for plaintiff

James G. Rice
Deputy City Attorney
Office of City Attorney
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Attorney for defendant City of Portland

HUBEL, Magistrate Judge:

Plaintiff Steven Field brings this action against Beaverton

FINDINGS AND RECOMMENDATION Page 1

1 Police Officer Daniel Coulson, Tri-Met Transit Officers James
2 Sandvik and Kristopher Barber, the Beaverton Police Department, the
3 Portland Police Bureau, the Tri-Met Transit Authority, the City of
4 Beaverton, and the City of Portland. He asserts claims under 42
5 U.S.C. § 1983 and Bivens v. Six Unknown Named Agents, 403 U.S. 388
6 (1971), for violation of his Fourth and Eighth Amendment rights,
7 due process and equal protection; violation of the Oregon
8 Constitution; and assault and battery. Defendant City of Portland
9 (the City) moves to dismiss the complaint on the grounds that 1)
10 plaintiff's § 1983 claims are barred by the statute of limitations
11 because plaintiff failed to serve a copy of the summons and
12 complaint on the City within the time allowed by either Oregon law
13 or the Federal Rules of Civil Procedure, and has failed to serve
14 any of the individual officers at all; 2) named defendant Portland
15 Police Bureau (PPB) is not amenable to suit in a § 1983 claim; 3)
16 the complaint does not allege that the City has an official policy
17 or custom which is the cause of plaintiff's constitutional
18 deprivation, and therefore under Monell v. Department of Social
19 Services, 436 U.S. 658 (1978), has failed to state a claim against
20 the City; 4) plaintiff has failed to state a claim for violations
21 of due process and equal protection, or for violation of the Eighth
22 Amendment; and 5) plaintiff's claim for punitive damages against
23 the city must be stricken because local governments are immune from
24 punitive damages liability under both federal and state law.

25 **Background Facts**

26 The complaint was filed on October 19, 2004. The complaint is
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1 signed by Scott Crawford, on behalf of himself and attorney Bryan
2 W. Dawson. Mr. Dawson is designated on the complaint as the trial
3 attorney.

4 The complaint alleges that on October 20, 2002, plaintiff was
5 sitting on the platform between the stairs at the Tri-Met MAX
6 station near the Burnside Bridge, and that the officer defendants
7 attacked him without warning, apparently believing he was in
8 possession of a controlled substance. Complaint, ¶ 12. Although
9 plaintiff did not resist, the defendant officers knocked him to the
10 ground, held his arms behind his back, kicked his legs, punched his
11 face, ground his face into the platform floor, and sprayed mace or
12 pepper spray directly into his face and directly into his mouth.
13 Id. When the officer defendants pulled plaintiff off the floor,
14 they found that a small packet of cocaine had been lying beneath
15 plaintiff's cheek, on the floor. Id. Plaintiff was arrested and
16 placed in a cell for an hour, where he was interrogated. His
17 requests for medical attention were ignored. Id.

18 Plaintiff alleges that as a result of this experience, he
19 suffered physical injury and emotional trauma. Id. at ¶ 13.

20 According to the affidavit of James Rice, counsel for
21 defendant City of Portland, the summons against the City of
22 Portland was issued on February 25, 2005, and served on the City on
23 February 25, 2005, 123 days after the complaint was filed.
24 According to the affidavit of Mr. Dawson, who is plaintiff's
25 counsel, Mr. Crawford resigned from the Oregon State Bar due to
26 health problems on October 25, 2004. Mr. Crawford assigned his

1 cases to Mr. Dawson, but Mr. Dawson has never communicated with the
2 plaintiff. Mr. Dawson does not deny that the individual defendants
3 have never been served with summons, or that the City of Portland
4 was served more than 120 days after filing of the complaint.

5 **Standards**

6 The limitations period for plaintiff's § 1983 claim is
7 established by Oregon's two-year statute of limitations for
8 personal injury actions, Or. Rev. Stat. 12.110(1). See Wilson v.
9 Garcia, 471 U.S. 261, 269, 276 (1985) (Because 42 U.S.C. § 1983 and
10 most related federal civil rights statutes have no independent
11 statute of limitations, the limitations period for commencement of
12 § 1983 actions must be borrowed from state law, and § 1983 claims
13 are to be characterized as personal injury actions). Plaintiff's
14 cause of action accrued on October 20, 2002 and the complaint was
15 filed on October 19, 2004, one day before the limitations period
16 expired.

17 **Discussion**

- 18 1. Is the action against the City and against the individual
19 defendants time-barred because plaintiff has failed to
make timely service?

20 The City argues that because plaintiff failed to make timely
21 service on it under either Or. Rev. Stat. § 12.020(2) or Rule (m)
22 of the Federal Rules of Civil Procedure, and has failed to make any
23 service at all on the individual defendants, his action is time-
24 barred.

25 In cases brought under 42 U.S.C. § 1983, federal courts borrow
26 the state statute of limitations for personal injury actions.

1 Wilson, 471 U.S. at 261. However, the court is to borrow "[o]nly
2 the length of the limitations period, and closely related questions
3 of tolling and application," id. at 269, and is to "borrow no more
4 than is necessary." West v. Conrail, 481 U.S. 35, 39 (1987).

5 The law of this jurisdiction is not clear on whether Rules 3
6 and 4(m) of the Federal Rules of Civil Procedure or Or. Rev. Stat.
7 § 12.020 govern the issue of when this action would be deemed
8 commenced.

9 Under Or. Rev. Stat. § 12.020(2), an action is deemed
10 commenced when the complaint is filed if the plaintiff effects
11 service within 60 days. If service occurs more than 60 days after
12 filing, the action is deemed to commence on the date of service.
13 See also Baker v. Kennedy, 317 Or. 372, 375 (1993). Plaintiff's
14 failure to effect service within 60 days means that under Or. Rev.
15 Stat. § 12.020(2), his action would be deemed commenced on the date
16 he served the City, February 25, 2005, well beyond the date the
17 statute of limitations expired.

18 Rule 3 of the Federal Rules of Civil Procedure provides that
19 a civil action is commenced by filing a complaint with the court.
20 Rule 4(m) provides:

21 If service of the summons and complaint is not made upon
22 a defendant within 120 days after the filing of the
23 complaint, the court, upon motion or on its own
24 initiative after notice to the plaintiff, shall dismiss
25 the action without prejudice as to that defendant or
26 direct that service be effected within a specified time;
27 provided that if the plaintiff shows good cause for the
28 failure, the court shall extend the time for service for
an appropriate period.

26 Under Rule 4(m), if service of process is not accomplished

1 within 120 days of the filing of the complaint, the district court
2 in its discretion may either dismiss the action without prejudice
3 or order service within a specified time; however, if the plaintiff
4 can show "good cause" for an extension, the district court *must*
5 extend the time for accomplishing service. Tyson v. City of
6 Sunnyvale, 159 F.R.D. 528, 529 (N.D. Cal. 1995). Even in the
7 absence of good cause shown, relief may be justified if the
8 applicable statute of limitations would bar the refiled action.
9 Henderson v. United States, 517 U.S. 654, 662-63 (1996), quoting
10 Notes of Advisory Committee on Rules, 1993 Amendment, New Rule
11 4 (m) .

12 In Strother v. Oregon, 1999 WL 558404 (D. Or. 1999), an action
13 under 42 U.S.C. § 1983, Judge Jones of this court held that because
14 Oregon's statute of limitations applied to the § 1983 claims,
15 Oregon's rule governing commencement of actions, Or. Rev. Stat. §
16 12.020, also applied, and rendered plaintiff's claim time-barred
17 because he failed to serve the defendant within 60 days of filing
18 the complaint. Plaintiff's claim accrued on July 23, 1993, and he
19 filed the complaint on July 14, 1995. However, defendant was not
20 served until March 1996.¹

21 But Judge Frye of this court had earlier held that Or. Rev.
22 Stat. § 12.020 conflicts with Federal Rule 3 and therefore cannot

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24 ¹So even if Judge Jones had found Federal Rules 3 and 4 (m)
25 applicable to the action, plaintiff's failure to serve the
26 complaint within 120 days meant that he risked dismissal under
27 the federal rules as well as § 12.020.

1 apply to § 1983 claims brought in federal court. Wells v. City of
2 Portland, 102 F.R.D. 796, 800 (D. Or. 1984) ("The prevailing rule
3 among the federal courts of appeals is that Rule 3 governs the time
4 of commencement of the action in cases where a federal matter or
5 cause of action is involved."); see also Hinz v. Weinstein, Civ.
6 No. 95-262-JE (December 1, 1995) (reiterating the ruling in Wells).

7 In Keller v. City of Portland, 1998 WL 1060222 (D. Or. 1998),
8 Judge Haggerty adopted the Findings and Recommendation of Judge
9 Stewart, and agreed with Judge Frye that Rules 3 and 4(m) govern
10 the time of commencement of the action in a § 1983 case.

11 Judge Stewart found that Or. Rev. Stat. § 12.020 was a
12 "closely related" provision of tolling and application under
13 Wilson, but that it must still be disregarded because it directly
14 conflicts with Federal Rules 3 and 4(m).² The court relied on West,³

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16 ²It should be noted that in Torre v. Brickey, 278 F.3d 917,
17 920 (9th Cir. 2002), the court held, in a diversity case, that
18 there was no conflict between Rule 4(m) and Or. Rev. Stat. §
19 12.020(2) because "Rule 4(m) merely sets a *procedural* maximum
20 time frame for serving a complaint, whereas [Or. Rev. Stat. §
21 12.020] is a statement of a substantive decision by that State
22 that actual service on, and accordingly actual notice to, the
23 defendant is an integral part of the several policies served by
24 the statute of limitations." (Emphasis in original) The court
25 concluded that a plaintiff in federal court has 120 days to
26 effect service after filing a complaint *only* if this period

1 where the Supreme Court held that "[t]he governing principle is
2 that we borrow only what is necessary to fill the gap left by
3 Congress," which does not include service rules. 481 U.S. at 39-40,
4 n. 6. The Court said in West:

5 Although we have not expressly so held before, we now
6 hold that when the underlying cause of action is based on
7 federal law and the absence of an express federal statute
8 of limitations makes it necessary to borrow a limitations
9 period from another statute, the action is not barred if
10 it has been "commenced" in compliance with Rule 3 within
11 the borrowed period. We decline respondents' invitation
12 to require that when a federal court borrows a statute of
13 limitations to apply to a federal cause of action, the
14 statute of limitation's provisions for service must
15 necessarily also be followed.

16 Id. at 39-40.

17 In Sorenson v. City of Portland, 2005 WL 525418, *2 (D. Or.
18 2005), Judge Aiken of this court declined to apply the state
19 relation-back rule in a § 1983 case, on the ground that under the
20 Supreme Court's holding in Wilson, 471 U.S. at 269, only the length
21 of the limitations period and other closely related questions of

22 enables him to serve within the statutory period for commencing
23 an action controlled by state law. Id. If there is no conflict
24 between the federal rule and state law, state law should apply.
25 Id. However, Torre was a diversity case, and therefore governed
26 by state law, rather than a § 1983 case with a borrowed state
27 statute of limitations. Torre was distinguished on that basis by
28 the court in Sorenson, *infra*.

³ West was not a § 1983 case.

1 tolling and application are to be governed by state law. The court
2 noted that following West, the Ninth Circuit has interpreted
3 "closely related questions of tolling" narrowly. Id.

4 I find the analysis of Judges Frye, Stewart and Aiken more
5 persuasive, and conclude that under the Supreme Court's decision in
6 West, the rules governing commencement of a § 1983 action for
7 purposes of the statute of limitations are Federal Rules 3 and 4(m)
8 rather than Or. Rev. Stat. § 12.020(2).

9 I turn now to the issue of whether plaintiff's complaint
10 should be dismissed without prejudice under Rule 4(m) for failure
11 to effect service within 120 days.

12 The only explanation plaintiff offers for the failure to serve
13 the City within 120 days and the failure to serve the individual
14 officer defendants is that Mr. Dawson has been unable to
15 communicate with his client since shortly after the complaint was
16 filed. Mr. Dawson requests an additional three months to locate his
17 client and serve the remaining defendants.

18 Contact or communication between plaintiff and his attorney is
19 in no way required for service on defendants who are known to
20 plaintiff's counsel, as they are named in the complaint. Therefore,
21 good cause for the failure to serve the defendants within the
22 required period is not established.

23 Although Henderson and the 1993 Advisory Commission's note
24 seem to favor the court's exercising its discretion to extend the
25 time for service, even without a showing of good cause, when a
26 refiled action would be dismissed on limitations grounds, I find
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1 the circumstances of this case inappropriate for doing so. The
2 complaint was filed over seven months ago. Some of the defendants
3 have to this day still not been served. Plaintiff has not shown
4 good cause for the failure to timely serve the defendants with
5 process. The record indicates that plaintiff has chosen not to
6 remain in contact with his attorney, strongly suggesting
7 plaintiff's lack of interest in pursuing this case.

8 Statutory limitation periods are designed to promote justice
9 by preventing the assertion of stale claims against a defendant.
10 United States ex rel. Hyatt v. Northrop Corp., 91 F.3d 1211, 1217
11 (9th Cir. 1996). See also New v. Armour Pharmaceutical Co., 67 F.3d
12 716, (9th Cir. 1995) (purpose of statute of limitations is to
13 motivate plaintiffs to diligently pursue their claims). The
14 limitation periods for gaining access to the federal courts are not
15 to be disregarded by courts out of a vague sympathy for particular
16 litigants. United States v. Marolf, 173 F.3d 1213, 1218 (9th Cir.
17 1999).

18 I therefore recommend that the City's motion to dismiss the
19 action as time-barred be granted.

20 2. Has plaintiff failed to state a claim against the PPB?

21 The City moves to dismiss the PPB as a defendant on the ground
22 that it is not a "person" subject to liability under 42 U.S.C. §
23 1983. The City is correct. See Keller, 1998 WL at *3 (holding that
24 PPB is not a "person" subject to liability under § 1983). If my
25 recommendation that the action be dismissed as time-barred is not
26 adopted, I recommend that the City's motion to dismiss the claim
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1 against the PPB be granted.

2 3. Has plaintiff failed to allege the existence of a policy
3 or custom of the City?

4 Congress intended the term "person" in § 1983 to include
5 municipalities, including counties. Christie v. Iopa, 176 F.3d
6 1231, 1234 (9th Cir. 1999). However, Congress did not intend to
7 create respondeat superior liability, see Board of County Comm'rs
8 of Bryan County v. Brown, 520 U.S. 397, 403 (1997), and isolated
9 instances of official misconduct are insufficient to establish
10 municipal liability under Monell, 436 U.S. at 690-91. See, e.g.,
11 Tuttle v. Oklahoma City, 471 U.S. 808 (1985).

12 A plaintiff can establish municipal liability under City of
13 Canton v. Harris, 489 U.S. 378 (1989) by showing that action
14 pursuant to official municipal policy of some nature caused a
15 constitutional tort. Monell, 436 U.S. at 691. To establish
16 municipal liability, the plaintiff must show: 1) a municipal
17 employee violated plaintiff's rights; 2) the municipality has
18 customs or policies that amount to deliberate indifference as that
19 phrase is defined by Canton; and 3) these policies were the moving
20 force behind the employee's violation of plaintiff's constitutional
21 rights, in the sense that the municipality could have prevented the
22 violation with an appropriate policy. Gibson v. County of Washoe,
23 Nev., 290 F.3d 1175, 1194 (9th Cir. 2002).

24 A local governmental entity's failure to train its employees
25 can also create § 1983 liability where the failure to train
26 "amounts to deliberate indifference to the rights of persons" with
27 whom those employees are likely to come into contact. Lee v. City

1 of Los Angeles, 250 F.3d 668, 681 (9th Cir. 2001), quoting City of
2 Canton, 489 U.S. at 388-89. For liability to attach, the identified
3 deficiency in the local governmental entity's training program must
4 be closely related to the ultimate injury. Id. In other words, a
5 plaintiff must show that his or her constitutional injury would
6 have been avoided had the governmental entity properly trained its
7 employees. Id.

8 _____A claim of municipal liability under section 1983 is
9 sufficient to withstand a motion to dismiss even if the claim is
10 based on nothing more than a bare allegation that the individual
11 officers' conduct conformed to official policy, custom, or
12 practice. Watts v. County of Sacramento, 256 F.3d 886, 891 (9th Cir.
13 2001); Galbraith v. County of Santa Clara, 307 F.3d 1119, 1127 (9th
14 Cir. 2002).

15 Plaintiff alleges in his complaint that the City, among other
16 defendants, was "responsible for training and supervising the
17 officer defendants," that it "failed to adequately train and
18 supervise officers, including specifically the officer defendants
19 here, in the proper, safe, and lawful manner of administering mace
20 and/or pepper spray when effecting an arrest or otherwise
21 performing the duties they were hired to perform," and that the
22 "public body defendants" have "failed to adequately train officers
23 in this regard with reckless and callous unlawful indifference to
24 the rights of plaintiff and all other citizens." Complaint ¶ 14.
25 This is sufficient to state a claim for municipal liability under
26 Watts and Galbraith. If my recommendation that the action be

1 dismissed as time-barred is not adopted, I recommend that the
2 City's motion to dismiss the § 1983 claim against it on this basis
3 be denied.

4 4. Has plaintiff failed to allege a violation of due
5 process?

6 The City moves to dismiss plaintiff's due process claim, on
7 the ground that he has failed to state a claim for either
8 substantive or procedural due process. I agree. Plaintiff's first
9 claim for relief is captioned, "Violation of 42 U.S.C. § 1983:
10 Fourth and Eighth Amendments, Due Process and Equal Protection."
11 Under that claim, plaintiff alleges that he

12 ///

13 had a right under the Fourth Amendment of the U.S.
14 Constitution to be free from unreasonable search and
15 seizure, and a right under the Eighth Amendment to avoid
16 cruel or unusual punishment. These rights inured to
17 plaintiff and are enforced against the states under the
18 Due Process Clause and the Equal Protection Clause in the
19 Fifth and Fourteenth Amendments to the U.S. Constitution.

20 Complaint, ¶ 16.

21 When an explicit textual provision of the Constitution
22 protects against the challenged government action, the claim must
23 be analyzed under that specific provision alone and not under the
24 more general guarantee of substantive due process.⁴ This rule was

25 ⁴ The Due Process Clause of the Fifth Amendment and the
26 Equal Protection component thereof apply only to actions of the
27 federal government-not to those of state or local governments.
28 Schweiker v. Wilson, 450 U.S. 221, 227 (1981). The same standards
are imposed on the states by the Fourteenth Amendment. Id. at n.

1 announced in Graham v. Connor, 490 U.S. 386 (1989), where the Court
2 held that claims of excessive force brought under § 1983 must be
3 analyzed under the explicit textual sources of constitutional
4 protection found in the Fourth and Eighth Amendments, rather than
5 under the "more subjective standard of substantive due process."
6 Armendariz v. Penman, 75 F.3d 1311, 1319 (9th Cir. 1996). In
7 Albright v. Oliver, 510 U.S. 266, 273 (1994), the Supreme Court
8 reaffirmed the rule of Graham. ("Where a particular Amendment
9 provides an explicit textual source of constitutional protection
10 against a particular sort of government behavior, that Amendment,
11 not the more generalized notion of substantive due process, must be
12 the guide for analyzing these claims.") The Court noted, "The
13 Framers considered the matter of pretrial deprivations of liberty,
14 and drafted the Fourth Amendment to address it." Id. at 274.

15 If my recommendation that the action be dismissed as time-
16 barred is not adopted, I recommend that the City's motion to
17 dismiss plaintiff's due process claim be granted.

18 5. Has plaintiff failed to allege a violation of the Eighth
19 Amendment?

20 The City moves to dismiss the Eighth Amendment claim on the
21 ground that plaintiff was not a prisoner at the time he was
22 allegedly subjected to unreasonable force. Plaintiff concedes the
23 argument. The Eighth Amendment's prohibition on cruel and unusual

24 _____
25 6. See also Lee, 250 F.3d at 683 ("Liberty is protected from
26 unlawful state deprivation by the due process clause of the
27 Fourteenth Amendment.")

1 punishment applies only after conviction and sentence. Graham, 490
2 U.S. 386, 393 & n. 6. If my recommendation that the action be
3 dismissed as time-barred is not adopted, I recommend that the
4 City's motion to dismiss plaintiff's claim under the Eighth
5 Amendment be granted.

6 6. Should plaintiff's claim for punitive damages against the
7 City be stricken?

8 The City asserts that plaintiff's claim for punitive damages
9 against the City is contrary to both federal and state law, citing
10 City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271
11 (1981) ("[W]e hold that a municipality is immune from punitive
12 damages under 42 U.S.C. § 1983.") and the Oregon Tort Claims Act,
13 Or. Rev. Stat. § 30.270(2) ("No award for damages on any claim
14 [against a public body or its officers, employees or agents acting
15 within the scope of their employment] shall include punitive
16 damages.")

17 Plaintiff counters with Memphis Community Sch. Dist. v.
18 Stachura, 477 U.S. 299, 307 (1986), where the Supreme Court noted
19 that in Smith v. Wade, 461 U.S. 30 (1983), the Court held that
20 "punitive damages may be available in a proper § 1983 case," and
21 Rogers v. Saylor, 306 Or. 267, 285 (1988).

22 In Smith, the Supreme Court held that punitive damages may be
23 awarded against *individual* defendants under § 1983. Smith does not
24 overrule the holding in City of Newport that municipalities are
25 immune from punitive damages in § 1983 claims.

26 Plaintiff's reliance on Rogers is misplaced. A state statute
27 purporting to immunize government conduct otherwise subject to suit

1 under 42 U.S.C. § 1983 is preempted, even where the federal civil
2 rights litigation takes place in state court. Martinez v.
3 California, 444 U.S. 277, 284, n. 9 (1980); see also Owen v. City
4 of Independence, 445 U.S. 622, 647, n. 30 (1980):

5 Conduct by persons acting under color of state law which
6 is wrongful under 42 U.S.C. § 1983 ... cannot be
7 immunized by state law. A construction of the federal
8 statute which permitted a state immunity defense to have
9 controlling effect would transmute a basic guarantee into
10 an illusory promise; and the Supremacy Clause of the
11 Constitution insures that the proper construction may be
12 enforced.

13 Thus, the Oregon Tort Claims Act is invalid when applied to §
14 1983 claims, regardless of whether the claims are litigated in
15 federal court or state court. The Rogers court so held. 306 Or. at
16 278-79. Because the damages awardable under 42 U.S.C. § 1983 are a
17 matter of federal, not state, law, the Oregon Tort Claims Act is
18 inapplicable to the § 1983 claim asserted in this case.

19 The Oregon Tort Claims Act does, of course, apply to
20 plaintiff's claims based on state law and common law, to the extent
21 that the individual defendants were acting within the scope of
22 their duties, but not to any state or common-law claim plaintiff
23 may have against individual defendants acting outside the scope of
24 their duties. Rogers, 306 Or. at 273, 286.

25 If my recommendation that the action be dismissed as time-
26 barred is not adopted, I recommend that the City's motion to strike
27 the punitive damages claim be granted.

28 **Conclusion**

I recommend that the City's motion to dismiss (doc. # 3) be
granted. If this recommendation is not adopted, I recommend that

1 plaintiff's claim against the PPB, and his Due Process and Eighth
2 Amendment claims, be dismissed with prejudice and that the punitive
3 damages claim against the City be stricken.

4 **Scheduling Order**

5 The above Findings and Recommendation will be referred to a
6 United States District Judge for review. Objections, if any, are
7 due June 24, 2005. If no objections are filed, review of the
8 Findings and Recommendation will go under advisement on that date.
9 If objections are filed, a response to the objections is due July
10 8, 2005, and the review of the Findings and Recommendation will go
11 under advisement on that date.

12 Dated this 8th day of June, 2005.

13
14 /s/ Dennis James Hubel

15 Dennis James Hubel
16 United States Magistrate Judge
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